86-760

No.

In The Supreme Court of the United States

October Term, 1986

HESCORP, HEAVY EQUIPMENT SALES CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals erroneously decide an important question of federal criminal law in ruling that Hescorp's activities were prohibited by Executive Order 12205 even though

(a) the Order expressly permitted "the engaging...in any service contract in support of industrial projects in Iran...entered into prior to the effective date" of the Order,

(b) the language of the Executive Order was adopted verbatim from a United States-sponsored U.N. Security Council resolution which was intended to and expressly did permit these very activities; and

(c) the shipments of non-military spare parts for use in a construction project were made pursuant to valid service contracts entered into five years prior to the Executive Order?

2. Did the Court of Appeals erroneously decide an important constitutional question concerning the interpretation of federal criminal statutes, contrary to applicable decisions of this Court, when it ruled that the Executive Order was not unconstitutionally vague despite (a) its failure to provide fair and adequate notice that the conduct at issue was prohibited, and (b) the express inclusion of civil penalties for violations of the Order?

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Petitioner Hescorp, Heavy Equipment Sales Corporation*("Hescorp") respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit filed

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* Petitioner Hescorp is a wholly-owned subsidiary of Impregilo S.p.A. which in turn is a subsidiary of Fiat S.p.A. Petitioner makes this statement in accordance with Supreme Court Rule 28.1.

September 11, 1986, affirming the judgment of conviction entered pursuant to a plea of guilty by Hescorp in United States District Court for the Eastern District of New York and the denial of petitioner's motion, pursuant to Rule 12(b)(2), Fed. R. Crim. Pro., to dismiss the indictment for failure to charge an offense.

OPINION BELOW

The opinion of the Court of Appeals, rendered on September 11, 1986, is appended to this Petition at Appendix A. The Judgment of the District Court, entered on December 13, 1985, is appended to this Petition at Appendix B.

JURISDICTION

This Petition for Writ of Certiorari is being timely filed within 60 days of the issuance of the opinion of the Court of Appeals, in accordance with Supreme Court

Rule 20.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

Executive Order 12205, 45 Fed. Reg. 24099, as amended by Executive Order 12211, 45 Fed. Reg. 26685 (April 17, 1980), and 31 C.F.R. §535.207(a), provide in pertinent part as follows:

> All of the following transactions are prohibited, except as authorized by means of regulations, rulings, instructions, licenses or otherwise:
>
> (1) The sale, supply or other transfer, by any person subject to the jurisdiction of the United States, of any items, commodities, or products, except food, medicine or supplies intended strictly for medical purposes, and donations of clothing intended to be used to relieve human suffering, from the United States or from any foreign country, whether or not originating in the United States, either to or destined for Iran, an Iranian governmental entity in Iran, or any other person or body for the purposes of any enterprise carried on in Iran.
>
> * * * * *

> (4) The engaging, by any person subject to the jurisdiction of the United States, in any service contract in support of industrial projects in Iran, except in such contracts entered into prior to the effective date [of the Regulations, i.e., April 9, 1980] or concerned with the provision of medical services.*

31 C.F.R. §535.701(b) and 50 U.S.C. §1706(b) provide that criminal violations of the above-noted regulation shall be punishable by a fine of not more than $50,000 in the case of a corporation. 31 C.F.R. §535.701(a) and 50 U.S.C. §1706(a) provide that civil violations of the regulation shall result in a civil penalty not to exceed $10,000.

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* The Executive Orders and implementing regulations were repealed on Jan. 21, 1981.

STATEMENT OF THE CASE

Hescorp is a small American service company and a wholly-owned subsidiary of Impregilo S.p.A., an Italian corporation engaged in the construction of civil works projects, primarily dams, throughout the world. Hescorp was formed in 1974 for the purpose of arranging with the manufacturers of heavy construction equipment for the acquisition and delivery of the equipment required by its parent company at its various construction jobsites worldwide.

In August 1974, five years before the Ayatollah Khomeini seized power in Iran, Impregilo formed a joint venture and entered into a contract with the former Imperial Government of Iran for the construction of a massive $157 million irrigation and drinking water dam on the Lar River in the mountains near Teheran. The project was sponsored initially by the World Bank and the United Nations Food and Agriculture Organization.

In 1975, almost five years before the imposition of the embargo against Iran, Hescorp entered into two written service contracts, one with its parent, Impregilo S.p.A., and one with the joint venture carrying out the Lar Dam project. The services rendered by Hescorp pursuant to these contracts included ordering from the manufacturers the spare parts or equipment required by Impregilo or the joint venture and arranging for freight forwarders to deliver the materials to the jobsites abroad at which they were were working, including the Lar Dam in Iran.

In February of 1979, the Lar Dam was almost 70% complete when the Imperial Government of Iran was overthrown by the Ayatollah. At the time, approximately 500 employees of Impregilo and their families, many of whom were Italian nationals, were living near the jobsite in a remote region of the mountains near Teheran. These employees and their families were in danger of imprison-

ment or physical harm in the event work on the Lar Dam were halted, including the threat that they would be taken hostage as were the American citizens at the U.S. Embassy in Teheran in November of 1979.*

Following the taking of the American hostages, the United States introduced Resolution 461 in the United Nations Security Council, in an effort to impose an international economic embargo against Iran. When members of the European Community, in particular, expressed concern that their nationals, working on existing projects in Iran, might also be taken hostage if work on those projects were halted pursuant to the embargo resolution, the United States modified the draft resolution by adding a provision expressly permitting the continuation of work on industrial projects

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* As an Italian corporation, Hescorp's parent, Impregilo S.p.A., was not prohibited from continuing to work on the Lar Dam project in any event. See 31 C.F.R. §535.207(b).

in Iran, provided the work was being performed pursuant to service contracts entered into before the embargo became effective. As the U.S. Ambassador to Italy during this period explained to the District Court, the service contract exception permitted "certain minimal shipments of goods necessary to carry forward and complete the service contracts."

Despite the support of the European Community in the U.N. Security Council, the resolution was vetoed by the Soviet Union in January of 1980. Thereafter, on April 7, 1980, in response to the continuing hostage crisis in Iran, President Carter unilaterally implemented the provisions of the U.N. embargo resolution by issuing Executive Order 12205, prohibiting certain transactions with Iran, but permitting "the engaging...in any service contract in support of industrial projects in Iran...entered into prior to the effective date [of the Order, i.e. April 7, 1980]." The language employed in the Executive Order

and in the implementing Treasury regulations, including the service contract exception, were taken verbatim from the United Nations resolution.*

At the time of the embargo, Hescorp had been performing services for both its parent company and the joint venture in connection with the Lar Dam project pursuant to service contracts entered into five years prior to that embargo and it continued to perform those services both during and after the embargo until the Lar Dam was completed in 1982.

On April 12, 1985, Hescorp was indicted in U.S. District Court for the Eastern District of New York for alleged violations of the Executive Order and implementing regulations arising from six shipments of spare parts for Caterpillar construction equipment to the Lar Dam site during the period of the embargo.

* Both the Executive Order and the implementing regulations were repealed on January 21, 1981 and thus were in force for a period of less than ten months.

Pursuant to Rule 12(b), Fed. R. Crim. Pro., Hescorp moved to dismiss the indictment on the ground that its actions in arranging for the shipment of spare parts to Iran were permitted under the Executive Order and regulations, having been carried out pursuant to valid service contracts entered into five years prior to the embargo and in support of the Lar Dam project. Hescorp claimed alternatively that if the Order and regulations did not permit the activities in question, they failed to provide fair and adequate notice of that fact and thus were unconstitutionally vague, making it impermissible to impose criminal sanctions, especially since the regulations provided civil sanctions as well. On September 20, 1985, the District Court denied Hescorp's motion.

Hescorp then entered into a plea agreement with the Government, pursuant to which (a) Hescorp plead guilty to making the six shipments of spare parts to Iran, and (b) Hescorp was permitted to appeal the legal issues raised by its motion to dismiss the

indictment. Thereafter, the District Court imposed a fine of $150,000 and permitted Hescorp to pursue its appeal of the legal and constitutional issues raised by its motion.

On September 11, 1986, the Court of Appeals for the Second Circuit affirmed the District Court's denial of Hescorp's motion. (A 1-17).

I

HESCORP'S ACTIVITIES PURSUANT TO VALID PRIOR SERVICE CONTRACTS WERE NOT PROHIBITED BY THE EXECUTIVE ORDER OR THE IMPLEMENTING REGULATIONS

In arranging for the acquisition and delivery to the Lar Dam project in Iran of the construction equipment spare parts at issue in this case, Hescorp was acting pursuant to two service contracts entered into by Hescorp itself and a third service contract between Hescorp's parent, Impregilo S.p.A. and the Imperial Government of Iran, all three contracts having been entered into at least five years prior to the effective date of the Executive Order and implementing

regulations. The Court of Appeals noted that at least one of the contracts to which Hescorp was a party was an exempt service contract within the meaning of the Executive Order and the regulations (A 7-8), but held that the shipment of spare parts pursuant to such a contract was prohibited, even if required in order to perform a permitted service contract. In so doing, the Court ignored the significant diplomatic history which underlay the precise provision at issue and rendered the service contract exception meaningless.*

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* There are few, if any, service contracts which do not require at least some spare parts or material for their execution, particularly in support of industrial projects. See Drames v. Milgreva Co. S.A., 571 F.Supp. 737, 739 (E.D.Pa. 1983). Had the Treasury Department intended to prohibit all service contracts, it would have done so explicitly as it did in the Libyan Sanctions Regulations, 31 C.F.R. §550.205, 51 Fed. Reg. 1354 (Jan. 10, 1986)(prohibiting "any contract in support of an industrial or other commercial or governmental project in Libya").

The language of the service contract exception is broad in its scope, covering "any" pre-existing service contract, regardless of the nature of the services to be rendered or the location at which they are to be performed. Had it been intended to exclude service contracts involving the incidental shipment of spare parts needed to carry out the project in Iran, the provision in question would have so stated. In reading such a limitation into the service contract exception, the Court of Appeals impermissibly expanded the reach of a criminal statute, contrary to abundant authority from this Court, see Dowling v. United States, 105 S.Ct. 3127, 3131-32 (1985); Williams v. United States, 458 U.S. 279, 290 (1982); United States v. Cardiff, 344 U.S. 174, 176 (1952) and reached a result which is totally at odds with the unequivocal diplomatic history of the events leading to the adoption of the service contract exception.

The Executive Order and implementing regulations, as discussed supra at pp.7-9, were taken verbatim from the United Nations Security Council resolution introduced by the United States but vetoed by the Soviet Union. In order to insure the support of the European Community, the United States modified the resolution to permit work to continue on service contracts in support of industrial projects in Iran, provided they were entered into prior to the embargo. As the U.S. Ambassador to Italy at the time explained to the District Court:

> It was made very clear to me... and I was obliged to make clear to President Carter and Secretary of State Vance that our European allies were not prepared to accept a total embargo on Iran. Therefore, the Security Council resolution stopped short of calling for a complete embargo and included this exception for service contracts.
>
> ...One reason that the European allies in fact insisted on the service contract exception was... to avoid putting at risk the nationals of Italy and other European countries that were present in Iran carrying out these service contracts.

The Ambassador went on to explain that in order to meet these concerns, the U.N. resolution was modified to "cover service contracts whose implementation also involved certain minimal shipments of goods necessary to carry forward and complete the service contract." (Transcript of Proceedings in the District Court, July 31, 1985, at 30-31).

This diplomatic history is of particular importance because the preambles to both the Executive Order and the regulations stated explicitly that they were to have the same effect on transactions with Iran as the vetoed U.N. resolution would have had. The Court dismissed this diplomatic history as inconsistent with the language of the provisions.(A 12). The service contract exception, however, was not intended to, and by its language did not, prohibit the shipment of spare parts needed to carry out a prior service contract and the Court of Appeals erred in holding otherwise.

II

IF THE SHIPMENTS WERE NOT PERMITTED, THE ORDER AND REGULATIONS FAILED TO PROVIDE FAIR AND ADEQUATE NOTICE THEREOF AND WERE UNCONSTITUTIONALLY VAGUE

In rejecting Hescorp's claim that the Executive Order and implementing regulations failed to provide fair and adequate notice that the activities in question were prohibited, the Court of Appeals ruled that the fact that clearer and more precise language might have been used did not render the provisions at issue unconstitutionally vague. (A 15). In so doing, the Court misapplied the void-for vagueness doctrine.

The void-for vagueness doctrine is based upon the principle that a criminal statute must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden," Colautti v. Franklin, 439 U.S. 379, 391 (1979); United States v. Harris, 347 U.S. 612, 617 (1954) and may not force him "to speculate, at

peril of indictment, whether his conduct is prohibited." Dunn v. United States, 442 U.S. 100, 112 (1979).

The plain language of Executive Order 12205 and the implementing regulation, 31 C.F.R. §535.207(a)(4), provides that the performance of any service contract in support of industrial project in Iran, where that contract was entered into prior to the imposition of the embargo, is permitted. The Court of Appeals nonetheless ruled that the prohibition on the shipment of goods contained in subsection (a)(1) was somehow paramount to subsection (a)(4), making it illegal to ship spare parts even though required in order to complete a permitted service contract. Apart from the fact that this reading of the provision in question is totally at odds with the diplomatic history of the service contract exception, as the Court acknowledged (A 12), it is certain that a "person of ordinary

intelligence" would not be put on notice by the language of the provision that the activities at issue here were prohibited. Given the fact that civil penalties were also provided for violations of the provisions at issue, see 31 C.F.R. §535.701(a), the imposition of criminal sanctions was constitutionally impermissible. Kolender v. Lawson, 461 U.S. 352, 357-58 (1983); Dunn v. United States, supra, 442 U.S. at 112-13.

The imprecision in the language of the Executive Order and regulations is, perhaps, not surprising given its adoption verbatim from the negotiated U.N. Security Council resolution. The desire to achieve an international diplomatic consensus was of paramount concern, rather than the drafting of a criminal statute in terms sufficiently precise to satisfy the requirements of the U.S. Constitution.

The Court of Appeals sought to cure the infirmities in the provision at issue

by reference to the interpretations of that provision by an Ad Hoc Committee at the Office of Foreign Assets Control ("OFAC") which was set up to handle applications for licenses under the Executive Order and regulations. (A 13). The informal interpretations offered by this self-professed ad hoc group as to the meaning of the regulations, however, do not satisfy the constitutional requirement that the language of the regulations themselves must be sufficiently precise to put a party on notice of that which is and is not prohibited conduct. See generally, Moore v. East Cleveland, 434 u.S. 494, 497-98, n.5 (1977); United States v. Penn. Industrial Chemical Corp., 411 U.S. 655, 673-75 (1973). Moreover, since a license from OFAC was required only for activities that were in fact prohibited, it is constitutionally impermissible to compel Hescorp to choose between (a) assuming its conduct was illegal and applying for a license or

(b) risking criminal prosecution for acting upon its well-founded belief that the shipments were permitted. See Dunn v. United States, supra, 442 U.S. at 112.

This Court has repeated held that one must "speak[] with special clarity when marking the boundaries of criminal conduct." Dunn v. United States, supra, 442 U.S. at 113. Although the origins of the language at issue in the political negotiations at the U.N. Security Council make the reasons for the ambiguities therein more comprehensible, they do not excuse the provisions from the requirements of the U.S. Constitution, particularly when the government seeks to impose criminal sanctions for claimed violations thereof.

It is well-settled that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant," Adamo Wrecking Co. v. United States, 434 U.S.

275, 285 (1978); United States v. Bass, 404 U.S. 366 (1971); Rewis v. United States, 401 U.S. 808, 812 (1971). In light of the ambiguity in the provisions at issue as to whether Hescorp's conduct was or was not prohibited, the Court of Appeals should have applied this rule of lenity and resolved the doubts in favor of Hescorp in the event it did not simply hold those provisions to be constitutionally infirm under the void-for vagueness doctrine.

CONCLUSION

A writ of certiorari should issue to review the decision of the United States Court of Appeals for the Second Circuit in order to resolve important questions of constitutional and federal criminal law which were incorrectly decided by that Court.

Respectfully submitted,

Jerry Lawrence Siegel
Counsel for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1235—August Term, 1985

(Argued May 5, 1986 Decided September 11, 1986)

Docket No. 86-1009

UNITED STATES OF AMERICA,

Appellee,

—against—

HESCORP, HEAVY EQUIPMENT SALES CORPORATION,

Defendant-Appellant.

Before:

VAN GRAAFEILAND, KEARSE and MINER,

Circuit Judges.

Appeal from a judgment of conviction entered upon a guilty plea in the United States District Court for the Eastern District of New York (Sifton, J.) for six violations of an embargo on exports to Iran, 50 U.S.C. §§ 1702, 1705, Exec. Order No. 12205, and 31 C.F.R.

§§ 535.207, 535.208, and 535.701. Appellant contends that its activities were not prohibited by the Iranian Embargo; that the Executive Order and Regulations were unconstitutionally vague; and that its activities were justified under the doctrine of necessity.

Affirmed.

LAWRENCE S. ROBBINS, Brooklyn, NY, Assistant U.S. Attorney (Reena Raggi, United States Attorney for the Eastern District of New York, Allyne R. Ross, Assistant U.S. Attorney, Brooklyn, NY, of Counsel) *for Appellee.*

JERRY LAWRENCE SIEGEL, New York, NY *for Defendant-Appellant.*

MINER, *Circuit Judge*:

Hescorp, Heavy Equipment Sales Corporation ("Hescorp") appeals from a judgment of conviction entered upon a conditional guilty plea, Fed. R. Crim. P. 11(a)(2), in the United States District Court for the Eastern District of New York (Sifton, J.). The judgment stems from six shipments of construction equipment and spare parts it made to Iran, by direct and indirect routes, in violation of an Executive Order and Treasury Regulations imposing an embargo on most exports to Iran. Hescorp contends that the indictment against it should have been dismissed

by the district court because the contracts under which it furnished the equipment and spare parts were "service contracts" entered into prior to the effective date of the Regulations and thus were exempt from the Embargo under Treasury Regulation § 535.207(a)(4). It also contends that the Order and Regulations were unconstitutionally vague and that its activities were justified under the doctrine of necessity. Finding these arguments to be without merit, we affirm the convictions.

I. BACKGROUND

Hescorp, a United States corporation, is a wholly-owned subsidiary of Impregilo, S.p.A. ("Impregilo"), an Italian corporation, and has as its primary business purpose the acquisition of construction equipment and parts, on behalf of Impregilo, for use in Impregilo's construction projects throughout the world. In August of 1974, Impregilo S.p.A. formed a joint venture with the Impregilo & Tessa Construction Corporation ("I&T") and entered into a contract with the Imperial Government of Iran for the construction of a dam on the Lar River ("Lar Dam"). In May of 1975, Hescorp (then known as Impregilo, U.S.A., Inc.) entered into a contract with Impregilo S.p.A. "for the purpose of expediting the acquisition and delivery of equipment, commodities and other goods and services . . . ." Hescorp also entered into a virtually identical contract with I&T for the explicit purpose of assisting I&T in completing the Lar Dam project.

Construction of the Lar Dam commenced in 1974 and was approximately seventy percent complete in February of 1979 when the Islamic Government of Iran, led by the Ayatollah Khomeni, overthrew the government of Dr.

Bakhtiar, the last Prime Minister appointed by the Shah. On November 4, 1979, armed militants attacked and seized the United States Embassy in Tehran, taking fifty-two Americans hostage. Ten days later, President Carter declared a national emergency to deal with the situation in Iran, Executive Order 12170, 44 Fed. Reg. 65729 (Nov. 14, 1979), thus becoming the first President to exercise the sweeping authority granted under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-1706 (1982).

In January of 1980, the United States introduced a Draft Resolution in the United Nations Security Council calling on the government of the Islamic Republic of Iran to release the United States hostages and requesting all member states to impose economic sanctions against Iran until such time as the hostages were released. The Draft Resolution prohibited exports to Iran, but contained an exception for the performance of pre-existing service contracts in support of industrial projects in Iran. Richard Gardner, the United States Ambassador to Italy throughout the period of United Nations deliberations, advised the district court that this exception was intended to encompass the shipment of spare parts and equipment to be used in connection with the performance of such service contracts. When the Resolution was put to a vote on January 13, 1980, the result was ten votes in favor, two, including the Soviet Union, against, and two abstentions. Since the Soviet Union, a permanent member of the Security Council, cast a negative vote, the Draft Resolution was defeated.

In April of 1980, the militants controlling the Embassy stated that they were willing to turn the hostages over to the government of Iran. The government refused. This

refusal dispelled any remaining doubt that the Islamic Government of Iran was unwilling to act to obtain the release of the hostages. Accordingly, on April 7, 1980, President Carter, under the authority of the IEEPA, issued Executive Order No. 12205, 45 Fed. Reg. 24099, *as amended by*, Exec. Order No. 12211, 45 Fed. Reg. 26685 (Apr. 17, 1980), which imposed a trade embargo on Iran, with certain limited exceptions. A Presidential Statement issued in conjunction with the Order stated in pertinent part:

> It must be made clear that the failure to release the hostages will involve increasingly heavy costs to Iran and its interests. I have today ordered the following steps:
>
> * * *
>
> (2) The Secretary of the Treasury will immediately put into effect official sanctions prohibiting exports from the U.S. to Iran in accordance with the sanctions approved by ten members of the United Nations Security Council on January 13, in the resolution which was vetoed by the Soviet Union.

On April 9, 1980, the Department of the Treasury, through its Office of Foreign Assets Control ("OFAC"), issued regulations implementing the embargo imposed by the Executive Order. These Regulations provided:

> § 535.207 Trade, Shipping and Service Transactions
>
> (a) All of the following transactions are prohibited, except as authorized by means of regulations, rulings, instructions, licenses or otherwise:

(1) The sale, supply or other transfer, by any person subject to the jurisdiction of the United States of any items, commodities or products, except food, medicine or supplies intended strictly for medical purposes, and donations of clothing intended to be used to relieve human suffering, from the United States or from any foreign country, whether or not originating in the United States, either to or destined for Iran, an Iranian governmental entity in Iran, any other person or body in Iran, or any other person or body for the purposes of any enterprise carried on in Iran.

* * *

(4) The engaging, by any person subject to the jurisdiction of the United States, in any service contract in support of industrial projects in Iran, except any such contracts entered into prior to the effective date or concerned with the provision of medical services.

The indictment in the instant case alleged that between April 25, 1980 and November 27, 1980, Hescorp, its president, Giuseppi Monti, Mangili Shipping Corp., and its president, William Barta, made six shipments of construction equipment and spare parts to Iran and to Switzerland, destined for Iran, in violation of the Executive Order and Treasury Regulations. All four defendants moved to dismiss the indictment, Fed. R. Crim. P. 12(b)(2), primarily on the ground that the contracts under which they furnished the equipment and spare parts to Iran were "service contracts" entered into prior to the effective date of the Regulations and thus were exempt from the Embargo under Treasury Regulation

§ 535.207(a)(4). Defendants also claimed that the shipments fell within the (a)(1) exception for "food, medicine, or supplies intended strictly for medical purposes . . ." or that they were exempt under the doctrine of necessity. Finally, defendants argued that if the regulations prohibited the subject shipments they were unconstitutionally vague.

The district court rejected each of these contentions. Hescorp entered a guilty plea in an agreement preserving its right to appeal the judgment of conviction. Fed. R. Crim. P. 11(a)(2). The remaining three defendants proceeded to trial and were convicted. Mangili's and Barta's convictions are the subject of a separate appeal (No. 86-1094). Monti, who fled the country just prior to trial, was tried in absentia and has not yet been sentenced.

Finding that Hescorp's activities were prohibited by the Iranian Embargo, that the Order and the Regulations were not unconstitutionally vague, and that Hescorp's activities were not justified under the doctrine of necessity, we affirm the conviction in all respects.

II. DISCUSSION

A. *Service Contract Exception*

Hescorp's primary contention on appeal is that the contracts under which it furnished the equipment and spare parts to Impregilo in Iran were "service contract[s] in support of [an] industrial project[ ] in Iran" entered into prior to the export ban and that therefore the shipments were exempt from the Embargo under Regulation § 535.207(a)(4). Since the government apparently agrees that at least one of the contracts to which Hescorp

was a party was such a service contract, the precise issue before us is whether the service contract exception was intended to permit only the provision of services in Iran or was also thought to allow a firm like Hescorp to ship equipment and spare parts to Iran in connection with the performance of an exempted service contract.[1]

As with all questions involving the interpretation of statutes, regulations, or other authoritative prescriptions, we embark on our task by examining the actual language used by the United States in effecting the Iranian Embargo. Section 535.207(a)(1) prohibited the "sale, supply or other transfer" of "any items, commodities or products . . . to or destined for Iran . . . ." In effect, this subsection served as the foundation of the Iranian Embargo, constituting a total ban on all exports to Iran. Subsection (a)(1) provided a limited exception for "food, medicine or supplies intended strictly for medical purposes . . . ." Hescorp's six shipments of construction equipment and spare parts to Iran clearly do not fall within this exception and Hescorp has not renewed this argument on appeal.

Significantly, subsection (a)(1) contains no exception for the "sale, supply or other transfer" of items to Iran to fulfill obligations under pre-existing service contracts.

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1. Thus, we do not reach Hescorp's attempt to characterize these contracts as service contracts under the Uniform Commercial Code. The U.C.C. definition was developed to distinguish between contracts for the *sale* of goods, which are subject to the U.C.C., and contracts for the provision of services, which are not. Here, the embargo prohibited the "sale, supply or other transfer" of any items, not just the sale of goods. Plainly, the U.C.C. is not very pertinent to our task. More important, as discussed above, we assume for the purposes of this decision that at least one of the Hescorp contracts was an exempted service contract.

Rather, the exception in which Hescorp seeks to find protection is found in subsection (a)(4). As a general matter, subsection (a)(4) prohibits the "engaging . . . in any service contract in support of industrial projects in Iran." The subsection then provides two exceptions to this prohibition for service contracts (1) "entered into prior to the effective date" of the embargo or (2) concerned with the provision of medical services. Hescorp's position is that the exception in (a)(4) for pre-existing service contracts should be read also to apply to the (a)(1) ban on the export of goods to Iran.[2]

Hescorp's position fails to grasp the essentially clear meaning of the Regulations. The broad, and seemingly all-inclusive, language of the (a)(1) export ban prohibits *any transfer* of *any items* for *the purposes of any enterprise in Iran*. Subsection (a)(4) provided an additional prohibition on engaging in any service contract in support of any industrial project in Iran. From this latter prohibition, the drafters of the Regulations carved a narrow exception for service contracts antedating the effective date of the Embargo.

In general, a proviso or exception is presumed to operate only on the section to which it is annexed, 2A *Sutherland Statutory Construction* § 47.11, at 145 (Sands 4th ed. 1984); *United States v. McClure*, 305 U.S. 472, 478 (1939); *Girard Bank v. Board of Governors of Federal Reserve System*, 748 F.2d 838, 841 (3d Cir. 1984), and

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2. As such, Hescorp's position would lead to an implicit contradiction between the export ban in (a)(1) and the pre-existing service contract exception in (a)(4). In interpreting these regulations, however, we are constrained to adhere to the maxim that courts should avoid contradictions, not create them. *See Atwell v. Merit Systems Protection Board*, 670 F.2d 272, 286 (D.C. Cir. 1981).

will escape "the narrow confines of its parent provision if to so imprison it would frustrate expressed or inferable legislative aims," *Gruver v. Secretary of Health, Education and Welfare*, 426 F.2d 1195, 1199 (D.C. Cir. 1969) (footnote omitted), *cert. denied*, 397 U.S. 977 (1970). *See generally* 2A *Sutherland Statutory Construction* § 47.11, at 145 (Sands 4th ed. 1984).

Here, the aims of the government in effecting the Embargo would in no way have been frustrated by limiting the pre-existing service contract exception to the ban on the rendering of services. The purpose of this narrow exception, as far as we can ascertain, was to protect those foreigners who already were in Iran performing services. To ban such people from further *performance of services* would place them in the unenviable position of either refusing to perform the agreed upon services in Iran or disobeying American law. Contrary to the implications of Hescorp's argument that service contracts often could not be performed without replacement of machinery and parts, the purpose of the exception was not to ensure the successful completion of all ongoing industrial projects in Iran. Indeed, such a purpose would directly contradict the stated goal of the economic sanctions against Iran: To make clear that the failure to release the hostages would involve increasingly heavy costs to Iran and its interests.

Thus, under the Regulations, persons subject to United States jurisdiction could continue to render "services" under pre-existing service contracts, but the Embargo prohibited them from selling, supplying, or transferring any items, even necessary ones, to Iran. Put quite simply, if the drafters of section 535.207 had wished the pre-exist-

ing service contract exception in (a)(4) to apply to the trade embargo in (a)(1), they would have said so.[3]

Seeking to avoid this conclusion, Hescorp asserts that the diplomatic and executive history of the Executive Order and Regulations clearly indicates that the service contract exception was designed to allow the shipment of spare parts and equipment in support of industrial projects in Iran. Hescorp observes that President Carter's statement accompanying Executive Order 12205 stated that the "official sanctions prohibiting exports from the U.S. to Iran" were "in accordance with the sanctions approved by ten members of the United Nations Security Council on January 13, in the resolution which was vetoed by the Soviet Union." Given this explicit identification of the source of the Executive Order and Regulations ultimately issued, we agree that the diplomatic history of that Resolution is pertinent to our consideration of the meaning of the subsequently enacted Regulations.

Indeed, historical information of this sort almost invariably is an important source of insight concerning the

3. We note that subsection (a)(4) also exempts from its prohibition service contracts "concerned with the provision of medical services." Significantly, subsection (a)(1) contains an exception for the transfer of "medicine or supplies intended strictly for medical purposes . . . ." If, however, we accepted Hescorp's view of the interrelationship between (a)(1) and (a)(4), there would seem to be no need to exempt medicine under (a)(1), as it could be transfered to Iran in connection with a contract concerned with the provision of medical services. Rather, a more reasonable interpretation of the regulation would view subsection (a)(1) as dealing with any transfer of items, and subsection (a)(4) as involved solely with the provision of services.

As the district court stated, "under the regulation the transfer of commodities pursuant to a service contract is prohibited under both subdivision (a)(1) and (a)(2) and the fact that the contract involved is one entered into after [sic] April 7, 1980, serves only to remove one of two alternative bases for prohibiting the transfer . . . ."

meaning of an enacted law. At the same time, we caution that courts must carefully consider the manner in which they use such historical data. Legislative or, as here, diplomatic history often is ambiguous and inconclusive. When a court locates historical evidence supporting its tentative interpretation of the text of a law, such evidence can be used with confidence to bolster the court's conclusion. In contrast, where historical evidence suggests a meaning contrary to the apparent import of the authoritative language, courts should be wary of relying on such evidence of intent to override the plain meaning of the text actually used. *Cf. Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 158 n.3 (1981) (per curiam) ("Absent a clear indication of legislative intent to the contrary, the statutory language controls its construction.").

As discussed above, the plain meaning and the structure of the Regulations indicate that the Iranian Embargo effected a complete ban on the type of shipments Hescorp made to Iran. The anecdotal, isolated statement of Ambassador Gardner simply is insufficient to overcome the largely plain meaning of the Regulations. First, Ambassador Gardner was merely one of the many actors who participated in resolving the hostages crisis and his understanding of the legal import of the Embargo is hardly dispositive. Moreover, as has already been demonstrated, Ambassador Gardner's understanding of the scope of the service contract exception contradicts the ordinary meaning of the text used. Finally, a more important participant in the development of the subject Regulations, OFAC, issued several contemporaneous interpretations of the Regulations that support the conclusion that Hescorp's

shipments of spare parts to Iran did not fall within the service contract exception.

Since OFAC was the agency charged with administering the Regulations, its views are entitled to substantial deference. *Blum v. Bacon*, 457 U.S. 132, 141 (1982). This is especially so here, because OFAC participated in developing the subject Regulations. *Miller v. Youakim*, 440 U.S. 125, 144 (1979).

It appears that OFAC denied licenses to several companies seeking permission to ship parts and materials to Iran for the use of other companies holding service contracts relating to industrial projects. For instance, on May 28, 1980, Zoker International, Ltd., a manufacturer of tunneling and mining equipment based in Aurora, Illinois, applied to OFAC for a license to sell tunneling equipment to a French contractor for the purpose of building a subway system in Tehran. Although Zoker presented several compelling equitable arguments in favor of granting the license, OFAC denied Zoker's request, stating: "Transactions of this type are not consistent with the present policy of this Government with respect to Iran." OFAC received a similar license application from Barber-Webb Company, Inc., a manufacturer of plastic pipe linings based in Los Angeles, California. Again, OFAC denied the license application because "[t]ransactions of this sort [were] not consistent with" the policy of the United States.

Particularly revealing of the manner in which the service contract exception was designed to work was OFAC's interpretation of the Regulations with regard to the International Telephone & Telegraph Corporation ("ITT") case. ITT had installed certain navigational equipment in

Iran under a 1978 contract. All of the equipment had been delivered in 1978. The contract required ITT to provide certain technical training. At a meeting in July of 1980, OFAC informed ITT that its training would be permitted under section 535.207(a)(4), but that ITT was not to provide any documentation, including training manuals, in connection with such training.

The only OFAC action in which Hescorp finds any support is an agenda item in one of the meetings of OFAC's Ad-Hoc Group on Iranian Sanctions. Although the factual situation presented to the Ad-Hoc Group involved the shipment to Iran of new material, OFAC determined not to object to such transfers because of their "nexus with an exempted service contract." Although this statement apparently supports Hescorp's position, we do not believe it should be given conclusive weight. First, the agenda item explicitly stated that this case presented "the issue of the relationship between the policies behind § 535.207 which exempts pre-existing service contracts and § 535.206 which prohibits financial transfers." More important, the service contract referred to in the agenda item was between a foreign subsidiary of a United States company and Iran. Since foreign companies were not covered by section 535.207, the transfers referred to were not barred by the Regulations, and thus OFAC merely decided "not to attempt to persuade the company to withdraw from the project . . . ."

In sum, the Regulations prohibited Hescorp's transfer of spare parts to Iran. The ban in (a)(1) was total and the limited exception to (a)(4)'s prohibition on engaging in service contracts should not be read also as an exception to the (a)(1) ban on exports.

We reject Hescorp's attempt to invoke the rule of lenity. That maxim is a doctrine of last resort, to be used only after the traditional means of interpreting authoritative texts have failed to dispel any ambiguities. *E.g.*, *United States v. Turkette*, 452 U.S. 576, 587 n.10 (1981); *United States v. Culbert*, 435 U.S. 371, 379 (1978); *United States v. Goldberg*, 756 F.2d 949, 956 (2d Cir.), *cert. denied*, 105 S. Ct. 2706 (1985). Here, as stated above, the Regulations were sufficiently clear to notify Hescorp that its shipments to Iran were prohibited.

B. *Void-for-Vagueness*

Hescorp submits, alternatively, that if the Regulations prohibited its shipments of equipment and spare parts to Iran, they failed to provide adequate and fair notice thereof and therefore were unconstitutionally vague. We cannot agree.

The Supreme Court has stated that "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). That the government "might, without difficulty, have chosen '[c]learer and more precise language' equally capable of achieving the end which it sought does not mean that the [regulations] which it in fact drafted [are] unconstitutionally vague." *United States v. Powell*, 423 U.S. 87, 94 (1975) (quoting *United States v. Petrillo*, 332 U.S. 1, 7 (1947)); *United States v. Herrera*, 584 F.2d 1137, 1149 (2d Cir. 1978). Rather, regulations are unconstitutionally vague "only when [they] expose[ ] a potential actor to some risk or detri-

ment without giving him fair warning of the nature of the proscribed conduct." *Rowan v. United States Post Office Department*, 397 U.S. 728, 740 (1970).

In this case, the Executive Order and the Regulations gave Hescorp fair notice that its intended shipments to Iran were prohibited. Indeed, the ambiguity that Hescorp points to in the Regulations arises mainly from Hescorp's tortured attempt to read the (a)(4) exemption into subsection (a)(1) and its unjustified assumption that the phrase "service contract" should be given a specialized connotation from the world of commercial law, *viz.*, a contract calling *predominately* for the provision of services. We do not believe these Regulations were so vague as to unfairly put Hescorp at risk.

Moreover, the crime with which Hescorp was charged is one of specific intent. If Hescorp had entered a plea of not guilty, the government would have been required to prove that Hescorp specifically intended to violate the Iranian Embargo Regulations. As we recently recognized, a requirement of willfulness makes a vagueness challenge especially difficult to sustain. *United States v. MacKenzie*, 777 F.2d 811, 816 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986). As the Supreme Court said in *United States v. Ragen*, 314 U.S. 513, 524 (1942): "On no construction can the statutory provisions here involved become a trap for those who act in good faith. A mind intent upon willful evasion is inconsistent with surprised innocence." *MacKenzie*, 777 F.2d at 816.

C. *Doctrine of Necessity*

Nor can Hescorp claim justification for its acts under the doctrine of necessity. Hescorp invoked this defense,

alleging that the shipments to Iran to complete the Lar Dam were necessary to protect the lives of the foreign workers and their families in Iran and to avert severe flooding and other disasters. To justify its criminal acts under this doctrine, however, Hescorp was required to demonstrate that the "necessity" was compelling, leaving no other course of conduct. So long as there existed a "reasonable, legal alternative to violating the law," *United States v. Bailey*, 444 U.S. 394, 410 (1980), Hescorp cannot justify its criminal acts by the doctrine of necessity. Consequently, this defense is highly fact sensitive and can be determined properly only after trial. Here, apart from Hescorp's unsubstantiated claims, there is no indication that the parts and supplies Hescorp shipped to Iran were necessary to avert a major catastrophe or that these items were not available from some source not subject to the jurisdiction of the United States. More important, Hescorp neither availed itself of the option of applying to OFAC for a license to export the "necessary" items nor demonstrated that such an application would have been futile. Thus, the necessity defense was unavailable to Hescorp as a matter of law.

III. CONCLUSION

Accordingly, finding that Hescorp's conduct was prohibited by Executive Order No. 12205 and the Treasury Regulations, that the Order and Regulations were not unconstitutionally vague, and that Hescorp cannot avail itself of the necessity defense, we affirm the judgment of conviction.